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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1950.
No. 343

BARBARA KARRELL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Barbara Karrell, defendant and appellant below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on the 24th day of April, 1950. A rehearing was denied by that Court on the 8th day of September, 1950, and the judgment of said Court is final.

Opinions Below.

The United States Court of Appeals for the Ninth Circuit rendered one opinion in the case [R. 682] which is reported in 181 F. 2d 981.

Jurisdiction.

The Court of Appeals for the Ninth Circuit had jurisdiction under Title 28, U. S. C. A., Section 1291.

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 1294.

Statutes Involved.

The statutes involved are the World War Veterans' Act of 1924, as amended, and the Servicemen's Readjustment Act of 1944, as amended, Title 38, U. S. C. A., Sections 694, 694a, 697 and 715. The pertinent portions of said statutes are contained in the Appendix hereto.

Statement of the Case.

The petitioner, defendant and appellant below, was indicted in the District Court of the United States for the Southern District of California, Central Division, on seventeen counts [R. 2-19], each count charging an offense identical with the others except as to the names of the veterans, dates of the alleged offenses, and the descriptions and values of the properties involved. Count Four of the Indictment is illustrative of all of said seventeen counts, and reads as follows:

> "On or about October 22, 1946, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant Barbara Karrell did knowingly cause to be made a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U. S. C., Sections 694 *et seq.*), in that defendant

did cause the Bank of America, National Trust and Savings Association, 1358 Third Street, Santa Monica, California Branch, to certify in a Home Loan Report presented to the United States Veterans Administration that the price paid by Philip Bentivegna, a veteran of World War II, for the purchase of a residential lot at 4907 Beloit Avenue, Los Angeles, California, as to which a loan guarantee was sought from the Government of the United States, was $1,550.00 and that the price paid by said veteran for such property did not exceed the reasonable value thereof of $1,650.00, as determined by proper appraisal dated July 24, 1946, made by Robert E. Gilliland, an appraiser designated by the Administrator of Veterans' Affairs; whereas as defendant well knew and caused to be concealed from said bank and Veterans Administration, the total price demanded and received by the defendant from said veteran for such property was $2,150.00 and did exceed the reasonable value thereof as determined by a proper appraisal."

Petitioner was convicted on Counts Two, Four, Five, Six, Nine, Eleven, Twelve, and Fourteen [R. 22-23]. On motion for judgment of acquittal, the District Court acquitted the petitioner on Counts Two and Five, but denied said motion as to Counts Four, Six, Nine, Eleven, Twelve, and Fourteen [R. 26-27].

The District Court entered judgment as follows: (1) That petitioner-defendant is guilty as charged in Counts Four, Six, Nine, Eleven, Twelve, and Fourteen; (2) that

she be imprisoned for one year on each of said six counts, and pay a fine of $1,000.00 for the offense stated in each such count; (3) that she be imprisoned until said fines are paid; (4) that the several periods of imprisonment run concurrently; (5) that the several sentences imposed be suspended and that defendant be placed on probation for five years, provided that she make restitution to the several veterans named in all of the seventeen counts of the indictment, and to one other person not so named, of the overpayments alleged to have been made by them to her for building lots aggregating $7,300.00 and that she pay a fine of $2,700.00 to the United States of America at such times and in such amounts as should be directed by the Probation Officer [R. 27-31].

From said judgment the petitioner appealed to the United States Court of Appeals for the Ninth Circuit [R. 32-33]. The Court of Appeals affirmed the judgment of the District Court in all respects, except that said Court ordered that the cause be remanded to the District Court

> "with instructions to amend the probation order by limiting the restitution to the veteran named in each of the six counts of the indictment as to which appellant stands convicted and by limiting such damages to the difference between the appraised value of the several lots and the actual sales price paid therefor" [R. 692].

Specification of Errors.

1. The Court below erred in holding that the penal provisions of the World War Veterans' Act of 1924, Title 38, U. S. C. A., Section 715, are incorporated in the Servicemen's Readjustment Act of 1944, Title 38, U. S. C. A., Sections 694, 694a, 697.

2. The Court below erred in holding that the penal provisions of the World War Veterans' Act of 1924 apply to, or make unlawful, the acts charged in the indictment in this case.

3. The Court below erred in holding that the acts charged in the indictment constitute an offense against the United States of America.

4. The Court below erred in holding that the District Court had jurisdiction to try and enter judgment against the petitioner for the offenses charged in the indictment.

5. The Court below erred in holding that there was any substantial evidence, or any evidence at all, to sustain the allegations of the indictment, or to support the verdict and judgment.

6. The Court below erred in holding, as a condition of probation, that petitioner make restitution to the six veterans named in Counts Four, Six, Nine, Eleven, Twelve and Fourteen of the indictment, since there is no evidence whatever in the record that said six veterans suffered any actual loss or damage that was caused by the offenses for which the conviction was had.

The Questions Involved.

The questions involved are those suggested in the Specification of Errors.

Reasons Relied on for Allowance of the Writ.

The writ of certiorari herein prayed for should be allowed by this Court for the following reasons:

1. The Court below has decided an important question of federal law, *i. e.*, that the penal provisions of the World War Veterans' Act of 1924 are incorporated in the Servicemen's Readjustment Act of 1944, contrary to the express provisions of said acts and to applicable decisions of this Court.

2. The Court below has decided an important question of federal law, *i. e.*, that the penal provisions of the World War Veterans' Act of 1924 are incorporated in the Servicemen's Readjustment Act of 1944, which has not been, but should be, decided by this Court.

3. Even if it be assumed that the penal provisions of the World War Veterans' Act of 1924 are incorporated in the Servicemen's Readjustment Act of 1944, the Court below has erroneously decided that the acts charged in the indictment are in violation of the penal provisions of said World War Veterans' Act of 1924.

4. There is no substantial evidence, or any evidence at all, to support the verdict and judgment below.

5. The Court below has erroneously decided that a defendant convicted of a federal offense may lawfully be required, as a condition of probation, to make so-called restitution to a person not shown by the evidence to have sustained any loss or damage by reason of the offense charged.

Summary of Argument.

The Court of Appeals erroneously held that the penal provisions of the World War Veterans' Act of 1924 (Title 38, U. S. C. A., Sec. 715) are validly incorporated, by reference, in the Servicemen's Readjustment Act of 1944 (Title 38, U. S. C. A., Sec. 697).

Said Acts of Congress do not prohibit or make unlawful the acts charged in the indictment against the petitioner, and the acts so charged do not constitute an offense against the United States.

The conviction herein rests solely upon alleged concealment by petitioner from the Bank of the true prices paid by veterans for lots sold them. There is not a word of evidence showing such concealment; on the contrary, the evidence shows, without contradiction, that the Bank had in its files, at the date of each Home Loan Report made to the Veterans Administration, written documents showing (a) the actual and true price paid for the lot and (b) the appraisal value thereof by a Government appraiser.

The district court was without jurisdiction and power to require petitioner, as a condition of probation, to pay sums of money to veterans, as so-called restitution, when the record fails to show that such veterans sustained any loss or damage by reason of the several offenses charged in the indictment.

ARGUMENT.

I.

The Penal Provisions of the World War Veterans' Act of 1924 Are Not Validly Incorporated in the Servicemen's Readjustment Act of 1944, Hence No Penalty Is Provided for the Acts Charged in the Indictment.

The Government has contended throughout this case that the acts charged against petitioner are unlawful because, it says, the penal provisions of the World War Veterans' Act of 1924 as amended (38 U. S. C. A., Secs. 712, 713, 714 and 715) are validly incorporated in the Servicemen's Readjustment Act of 1944 (38 U. S. C. A., Sec. 697). The Government relies upon Section 697 of Title U. S. C. A. which provides in this connection:

> "(a) Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-3, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, *shall be for application under this chapter.*" (Italics ours.)

The phrase "shall be for application under this chapter" is not only vague and uncertain, but it is meaningless. So far as careful research discloses, the phrase is not to be found in any other statutes, or in any reported decisions prior to the enactment of Section 697, *supra*. It is a maverick. The phrase does not meet the requirements of law laid down in many decisions that "There are no con-

structive offenses; and, before an accused can be punished, his act must *plainly* be within the statute." *Fasulo v. United States,* 272 U. S. 620, 629. (Italics ours.)

It is well settled that no act can be punished as an offense against the United States unless it is prohibited and made punishable by an Act of Congress; and the federal courts cannot by construction make that a crime which is not so prohibited. (*Langetta v. New Jersey,* 306 U. S. 451; *United States v. Resnick,* 299 U. S. 207; *Donnelly v. United States,* 276 U. S. 505; *Fasulo v. United States,* 272 U. S. 620, *supra; United States v. Arnold,* 115 F. 2d 523; 22 Corpus Juris Secundum 66, 67, Sec. 17 of Criminal Law.)

The acts charged in the indictment are: that the petitioner, by *concealing* from the Bank of America the true prices paid by veterans for lots purchased from petitioner, thereby caused the Bank to make false certificates and papers to the Veterans Administration. Such acts of concealment are nowhere prohibited or made punishable in the World War Veterans' Act of 1924 or in the Servicemen's Readjustment Act of 1944; such acts are not even mentioned in either of said Acts of Congress. The Government and Courts may not read into these Acts something that is not "plainly within the statute." ***Fasulo v. United States, supra.***

II.

If, However, It Be Assumed That the Penal Provisions of the World War Veterans' Act Are Validly Incorporated in the Servicemen's Readjustment Act, Such Penal Provisions Do Not Apply to the Acts Charged in the Indictment and, Hence, Do Not Constitute Offenses Against the United States.

What are the penal provisions of the World War Veterans' Act? They are found in Sections 712, 713, 714, and 715 of Title 38 U. S. C. A. and are now noted.

Section 712 of said Title 38 makes any sworn false statement perjury, where it is made and filed to support a claim for benefits such as pensions, medical, hospital and retired officers pay benefits. Section 713 creates a punishable offense for accepting payment of a pension when the right thereto has ceased. Section 714 creates a punishable offense for receiving a pension when the recipient is not entitled thereto. Certainly, the penal provisions of these sections have no application to the acts charged in the indictment in this case. The Government must, therefore, rely upon Section 715 to sustain petitioner's conviction.

Section 715 of Title 38 U. S. C. A. provides:

> "Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty

> of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both."

The acts made punishable by Section 715, *supra,* do not include the acts charged against petitioner in the indictment in this case. The acts made punishable by Section 715 are limited to the following: making or causing to be made false statements in an application for a pension (Title 38 U. S. C. A. Section 701), or for domiciliary care or hospital treatment (*id.* Section 706), or for emergency officers' retired disability pay (*id.* Section 710), or for receiving a pension the right to which has ceased (*id.* Section 713), or for receiving a pension without being entitled thereto (*id.* Section 714). The act of concealing the true price paid by a veteran for a building lot, and thereby causing a lender to make a false statement to the Veterans Administration, is not made unlawful or punishable by Section 715, or any other section, of the World War Veterans' Act of 1924 or by the Servicemen's Reaadjustment Act of 1944; such an act could not be unlawful, since it is not mentioned in either of said Acts.

Moreover, Section 715 and other sections referred to therein, apply only to a veteran, or other person, entitled to benefits under the Act of 1924, and not to third persons. This is clearly shown by the language used in Section 715, as follows:

> "Any person who shall knowingly make or cause to be made * * * a false or fraudulent * * * certificate (or) statement * * * concerning any claim for benefits under (specified sections of the Act of 1924) * * * shall *forfeit* all rights, claims, and benefits under said sections, *and, in addition* to any

> and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished * * *." (Italics ours.)

It is thus manifest that only a veteran, or some member of his family, who is entitled to a pension or to some other benefit under the Act of 1924 could "forfeit his rights and claims" thereto; and it is equally manifest that only such veteran, or member of his family, entitled to such benefits and who has forfeited them could be included in the statutory language "and, *in addition* * * * shall be guilty of a misdemeanor * * *." In the quaint language of petitioner's trial counsel: "you can't add onto something you do not have. You could not get that additional penalty on if you did not have some right to forfeit" [R. 394]. This is but another way of saying that the language of Section 715, *supra,* does not apply to a person who is not entitled to some right under the Act of 1924.

The Court of Appeals relies on its own decision in *Young v. United States,* 178 F. 2d 78, to sustain its holding herein that the penal provisions of the Act of 1924 are incorporated by reference in the Act of 1944. (181 F. 2d 980, at page 984.) This Court denied certiorari in the *Young* case, *supra,* 70 S. Ct. 573, without assigning a reason for such denial. It is respectfully submitted that the question whether the penal provisions of the Act of 1924 are validly incorporated in the Act of 1944 should be definitely settled by the decision of this Court.

III.

There Is No Substantial Evidence, or, Indeed, Any Evidence at All, to Support the Verdict and Judgment Below.

The indictment charges that petitioner caused the Bank of America to make false certificates or statements to the Veterans Administration concerning the prices paid by veterans for lots purchased by them; and it charges that the method used by petitioner to cause the Bank to make false statements was by *concealing* from the Bank the true prices paid to her for said lots. Concealment is, therefore, the vital essence of the offenses charged.

There is not one word of evidence in the record that shows, or even tends to show, that the petitioner concealed from the Bank of America the actual and true prices paid to petitioner for the lots in question. On the contrary, *the record shows that the true prices paid for these lots were fully disclosed to the Bank by written escrow instructions deposited with the Bank in each sale of a lot to the veterans involved prior to the making of the alleged false statements by the Bank to the Veterans Administration.* The record thus shows that the true prices paid for the lots were not, and could not have been, concealed from the Bank and the trial court so stated. [See colloquy between Court and Government counsel, R. 412-413.] The evidence of the two officers of the Bank, who testified for the Government, shows that the escrow instructions in each and every instance disclosed the true amount paid to petitioner by each veteran [R. 311-337]. The evidence of petitioner,

elicited by Government counsel, shows that "the first escrow instruction (in each sale) always stated the precise and exact and true amount which was paid for the lot" [R. 500]. There was no evidence at all to the contrary. Indeed, under pressure of the trial judge Government counsel admitted that the Bank knowingly made the false certificates or statements to the Veterans Administration [R. 418], since it had or was charged with knowledge of the true prices paid for lots as shown by the escrow instructions deposited with the Bank. Even the Court of Appeals admitted that the Bank had such knowledge, saying (181 F. 2d at page 986):

> "It is true that information furnished the Bank through both (of its) branches constituted a full statement of the facts (relative to lot prices)."

It is thus manifest that petitioner did not conceal and that she could not have concealed from the Bank the true prices paid to her for the lots in question. The Bank had documentary evidence in its files of the true price paid for each such lot at the time it made its Home Loan Report to the Veterans Administration.

Moreover, the Bank had in its files, before making each such Home Loan Report, the report of the Government appraiser showing the appraisal value of each lot sold, as well as the true price paid by each veteran for his lot. The following table, compiled from Exhibits 11-A, 13-A, 15-A, 16-A, 17-A, and 18-A, on file herein, conclusively establishes knowledge by the Bank of prices paid for lots

and appraisal values thereof at the dates of the several Home Loan Reports to the Veterans Administration:

Count of Indictment	Name of Veteran	Date of Escrow	Date of Appraisal Report	Date of Report to V.A.	Exhibit No.
4	Philip Bentivegna	7-20-46	7-24-46	8-17-46	11-A
6	David Wilder	7-12-46	7-23-46	8-12-46	13-A
9	Fritz Kornfeld	6-17-46	7-11-46	8-12-46	15-A
11	John L. Chamberlain	6-25-46	7-10-46	8- 8-46	16-A
12	David Bruce Register	6- 5-46	7- 3-46	9-11-46	17-A
14	Louis Martin Higgins	5-19-46	5-29-46	7- 2-46	18-A

The record shows, in this connection, that the petitioner never had, at any time prior to the finding of the indictment, any knowledge whatever concerning the appraisal value of the lots. She testified, and there is no evidence to the contrary [R. 467]:

> "Q. Did you thereafter at any time receive any information as to the appraised value of the lot based on the appraisal made by an appraiser designated by the Veterans Administration? A. The first time I knew the appraisal was when I received the indictment.
>
> Q. That is after the indictment had been returned against you? A. That is true."

In respect to this testimony, the Court below said:

> "It is of no particular importance that the appellant did not know exactly what the appraisal would be. She was no doubt acquainted with values of the property she was dealing in and knew something of its appraisal value. Whether she estimated the appraisal

> value accurately or not does not affect the result. She desired a false report to go from the lending bank to the Government officials who passed upon the loans and in some manner procured the bank to cooperate in her scheme to accomplish this end." (181 F. 2d 986.)

The Court's conclusions rest upon mere assumption, without evidentiary support. The Court assumed that although petitioner "did not know exactly what the appraisal would be" she knew something thereof, notwithstanding she had testified without contradiction that she never knew the appraisals until after the indictment was returned. The Court then attempts to justify its unfounded assumptions by saying "she desired a false report" to be made, and "in some manner (not disclosed) procured the bank to cooperate in her scheme to accomplish this end."

The conviction in this case is a travesty on justice. There is no substantial evidence to support it; and it should be reversed.

IV.

The District Court Was Without Jurisdiction or Power to Require Petitioner, as a Condition of Probation, to Make So-called Restitution to Veteran-Purchasers of Lots, Because There Is No Evidence in the Record to Show That Such Veterans Suffered Any Actual Damages or Loss by Reason of the Offenses for Which Conviction Was Had.

The judgment of the trial court ordered that petitioner be placed on probation for five years, and that, as a condition thereof, she make restitution of sums aggregating $7,300.00 representing the difference between the prices paid for lots and the appraised values thereof. The Court of Appeals ordered that restitution aggregating $3,300.00 apply only to the veterans named in the six counts for which conviction was had, and ordered that the judgment of the district court be amended accordingly and, as thus amended, affirmed.

There is not one word of evidence in the record that shows that the six veterans involved in the judgment, or any or either of them, suffered or sustained any "actual damages or loss caused by the offense(s) for which conviction was had." (18 U. S. C. A., Sec. 3561.) In the total absence of evidence showing "actual damages or loss," the district court was without jurisdiction or power to adjudge, as a condition of probation, that petitioner make so-called restitution.

Section 3651 of Title 18, U. S. C. A. (new Criminal Code) provides in this connection that probation may be granted to a defendant convicted of any offense against

the United States not punishable by death or life imprisonment. The section further provides:

> "While on probation and among the conditions thereof, the defendant—
>
> May be required to pay a fine in one or several sums; and
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had * * *."

It is thus made plain that, before the Court may order restitution as a condition of probation, the evidence must show that the aggrieved party has suffered *actual* damages or loss by reason of the offense for which conviction was had. There is no such showing in the record herein. The Court below stated (181 F. 2d 987):

> "But restitution in the sense the word is used here means giving back the sum paid by the veteran over and above the value of the thing he got. The value of the thing he got is the sum it was appraised at. Therefore, the sum which can be ordered restored to the veteran as restitution is the difference between the appraised value and the actual purchase price."

The appraised value mentioned by the Court was the amount fixed by one appraiser for the purpose of guaranteeing a loan. Such appraised value has no necessary relation to the actual or market value of the property, and it may not be so assumed. To determine whether any veteran involved suffered actual damages or loss certainly required more evidence of property values than an appraisal for loan purposes. It may well be that actual, or sale, values at the time of sentence greatly exceeded the appraised values at the time the loans were guaranteed. The

Court had no ground for assuming, as it did, that appraised value for loan purposes represented the actual or market value of the property.

Wherefore, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit, to the end that the errors aforesaid may be corrected by this Court.

Respectfully submitted,

JOHN W. PRESTON,
Counsel for Petitioner.

APPENDIX.

The pertinent provisions of the World War Veterans' Act of 1924, and of the Servicemen's Readjustment Act of 1944, as amended, are codified in Title 38, U. S. C. A., as follows:

Section 694 of said Title 38, in so far as applicable, provides:

"(a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this subchapter. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this subchapter, is automatically guaranteed by the Government by this title in an amount not exceeding fifty per centum of the loan: *Provided*, That the aggregate amount guaranteed shall not exceed $2,000 in the case of non-real-estate loans, nor $4,000 in the case of real-estate loans; or a prorated portion thereof on loans of both types or combination thereof.

* * * * * * * * *

"(c) An honorable discharge shall be deemed a certificate of eligibility to apply for a guaranteed loan. Any veteran who does not have a discharge certificate, or who received a discharge other than honorable, may apply to the Administrator for a certificate of eligibility. Upon making a loan as provided in this subchapter, the lender

shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of the guaranty. He shall also endorse on the veteran's discharge, or eligibility certificate, the amount and type of guaranty used, and the amount, if any, remaining.

* * * * * * * * *

"(d) Loans guaranteed under this subchapter may be made by any Federal land bank, national bank, State bank, private bank, building and loan association, insurance company, credit union, or mortgage and loan company, that is subject to examination and supervision by an agency of the United States or of any State or Territory, including the District of Columbia. * * *

"(e) Any loan proposed to be made to an eligible veteran by any lender not of a class specified in subsection (d) may be guaranteed by the Administrator if he finds that it is in accord otherwise with the provisions of this subchapter."

Section 694a of said Title 38 provides:

"Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making re-

pairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following:

(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

(2) That the contemplated terms of payment required in any mortgage to be given in part payment of the purchase price or the construction cost bear a proper relation to the veteran's present and anticipated income and expenses; and that the nature and condition of the property is such as to be suitable for dwelling purposes; and

(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator."

Section 697 of said Title 38 provides:

"(a) Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, shall be for application under this chapter. For the purpose of carrying out any of the provisions of sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and this chapter, the Administrator

shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable."

Section 715 of said Title 38 provides:

"Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both."

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 343

BARBARA KARRELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (V R. 682-691) is reported at 181 F. 2d 981.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 1950 (V R. 692), and a petition for rehearing was denied on September 8, 1950 (V R. 693). The petition for a writ of certiorari was filed on October 4, 1950. The jurisdiction of this Court is invoked under 28 U.S.C.

1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the criminal sanctions of Section 1500 of the Servicemen's Readjustment Act of 1944 and Section 15 of the Act of March 20, 1933, c. 3, 48 Stat. 8, 11, apply to one who knowingly causes a false certificate to be made concerning a claim for benefits under the 1944 Act.

2. Whether petitioner can validly be required, as a condition of probation, to make restitution to each of the veterans named in the counts on which she was convicted in an amount equal to the difference between the actual purchase price of the property involved and the appraised value of such property.

3. Whether the evidence is sufficient to support petitioner's conviction.

STATUTES INVOLVED

The pertinent provisions of the Servicemen's Readjustment Act of June 22, 1944, c. 268, 58 Stat. 284, 291, as amended by the Act of December 28, 1945, c. 586, 59 Stat. 623, 626, are as follows:

> Sec. 500. [38 U.S.C. 694(a)] (a) Any person who shall have served in the active military or naval service of the United States at any time on or after September 16, 1940, and prior to the termination of the present war and who shall have been discharged or released therefrom under conditions other than

dishonorable after active service of ninety days or more, or by reason of an injury or disability incurred in service in line of duty, shall be eligible for the benefits of this title. Any loan made by such veteran within ten years after the termination of the war for any of the purposes, and in compliance with the provisions, specified in this title, is automatically guaranteed by the Government by this title in an amount not exceeding fifty per centum of the loan: *Provided,* That the aggregate amount guaranteed shall not exceed $2,000 in the case of non-real-estate loans, nor $4,000 in the case of real-estate loans; or a prorated portion thereof on loans of both types or combination thereof.

* * * * *

Sec. 501. [38 U.S.C. 694a] Any loan made to a veteran under this title, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is automatically guaranteed if made pursuant to the provisions of this title, including the following:

(1) That the proceeds of such loan will be used for payment of the property purchased or constructed or improved;

* * * * *

(3) That the price paid or to be paid by the veteran for such property or for the

cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator.

* * * * *

Sec. 1500. [38 U.S.C. 697] Except as otherwise provided in this Act, the administrative, definitive, and penal provisions under Public, Numbered 2, Seventy-third Congress, as amended, and the provisions of Public, Numbered 262, Seventy-fourth Congress, as amended (38 U.S.C. 450, 451, 454a and 556a), shall be for application under this Act. For the purpose of carrying out any of the provisions of Public, Numbered 2, as amended, and this Act, the Administrator shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable.

Public Law No. 2, 73d Cong., 1st sess., referred to in Sec. 1500 of the Servicemen's Readjustment Act of 1944, is the Act of March 20, 1933, c. 3, 48 Stat. 8, 11, hereinafter referred to as the 1933 Act, Sec. 15 of which (38 U.S.C. 715) provides:

> Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing pur-

porting to be such, concerning any claim for benefits under this title, shall forfeit all rights, claims, and benefits under this title, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

18 U.S.C. 3651 provides in pertinent part:

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. * * *

* * * * *

While on probation and among the conditions thereof, the defendant—

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; * * *

* * * * *

STATEMENT

On October 27, 1948, in the District Court for the Southern District of California, petitioner was indicted in 17 counts for knowingly causing false certificates to be made concerning veterans' claims for benefits under the Servicemen's Readjustment Act of 1944, in violation of Section 1500 of that Act (38 U.S.C. 697) and Section 15 of the 1933 Act (38 U.S.C. 715) (I R. 2-19). The counts are identical except as to the dates, amounts and the veterans named therein, and count 4, the first of those upon which petitioner stands convicted, is quoted here in pertinent part as typical of those counts (I R. 5-6):

> * * * defendant BARBARA KARRELL did knowingly cause to be made a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U.S.C. Sections 694, et seq.), in that defendant did cause the Bank of America, National Trust and Savings Association, 1358 Third Street, Santa Monica, California Branch to certify in a Home Loan Report presented to the United States Veterans Administration

> that the price paid by Philip Bentivegna, a veteran of World War II, for the purchase of a residential lot at 4907 Beloit Avenue, Los Angeles, California, as to which a loan guarantee was sought from the Government of the United States, was $1,550.00 and that the price paid by said veteran for such property did not exceed the reasonable value thereof of $1,650.00, as determined by proper appraisal dated July 24, 1946, made by Robert E. Gilliland, an appraiser designated by the Administrator of Veterans' Affairs; whereas, as defendant well knew and caused to be concealed from said bank and Veterans Administration, the total price demanded and received by the defendant from said veteran for such property was $2,-150.00 and did exceed the reasonable value thereof as determined by a proper appraisal.

Prior to trial, the court, on the Government's motion, dismissed counts 1, 3, 8, 10, 13, 15, 16, and 17 (II R. 3). Count 7 was dismissed at the close of the Government's case on a like motion (III R. 386). Petitioner's motion for judgment of acquittal as to the remaining counts, on the ground, *inter alia,* that they failed to state facts sufficient to constitute an offense against the United States (III R. 388), was denied at the close of the Government's case (III R. 431) and again at the close of all the evidence (IV R. 507-508, 519, 523). The jury found petitioner guilty on these counts (IV R. 631-632), but the court thereafter granted a judgment of acquittal as to counts 2 and 5 on the

ground that the certificates presented to the Veterans Administration in the transactions on which they were based showed on their face that the prices the veterans were paying for the lots exceeded the appraised value (IV R. 638-642, 647). The motion for judgment of acquittal was in other respects denied (IV R. 647), as were motions in arrest of judgment and for a new trial (IV R. 649).

The evidence showed that petitioner, after purchasing a large tract of land for the specific purpose of selling it to veterans for residential purposes under the Servicemen's Readjustment Act of 1944, sold lots to the veterans named in the indictment and as part of the transactions had them sign contracts with a building contractor, Culver City Housing, for the construction of houses on the lots (III R. 236-237, 454-455, 458). In the sales described in five of the six counts on which petitioner stands convicted, she accomplished the falsification of the actual selling price of the lots by first executing a deed to a third party, usually a friend or relative of the veteran-purchaser, for the price charged by her. The third party paid nothing for the land and immediately deeded it to the veteran, purportedly for a lower price, which was later reported to the Veterans Administration as the selling price. Actually, however, the veteran paid petitioner the higher price involved in the initial transaction. (III R. 238-250, 460-466.) The mortgagee, the Bank of America, was informed of the two transactions, but in its Home Loan Reports

to the Veterans Administration gave as the selling price the purported price involved in the conveyance from the third party to the veteran (II R. 36-39, 42-44, 47, 60-66, 72; III R. 325, 341-345). In the sale described in count 9 (I R. 10-11), only a deed from petitioner to the veteran was executed, but in the statement to the bank submitted and prepared by petitioner and signed by the veteran, a selling price of $1500.00 was given, and the bank reported to the Veterans Administration that $1500.00 was the selling price. The veteran, however, actually paid $1750.00. Petitioner testified that when she submitted the statement to the bank, she informed them that the selling price was $1750.00. (II R. 141-147, 156-157; IV R. 492-493.) In each instance the actual price exceeded the appraised value and in each instance the bank certified to the Veterans Administration that the price paid did not exceed such value (II R. 21-29).

Petitioner was sentenced to one year's imprisonment and fined $1,000 on each of counts 4, 6, 9, 11, 12, and 14, the imprisonment sentences to run concurrently. Execution of all the sentences was suspended, however, and petitioner was placed on probation for five years on conditions, to which she made no objection, *inter alia,* (1) that she make restitution in the total amount of $7,300 to the veterans named in the seventeen counts of this indictment and another veteran named in another indictment which was dismissed (IV R. 677), the amount of the restitution in each instance to be

the difference between the actual selling price of the land and the selling price as reported to the Veterans Administration, and (2) that she pay a fine of $2,700 to the United States (I R. 27-32). On appeal, the Court of Appeals sustained the conviction, but remanded the case to the trial court with instructions to amend the probation order by limiting the restitution to the veterans named in the six counts on which petitioner was finally convicted and limiting the amount of the restitution to the difference between the actual selling price and the value as appraised by Veterans Administration (V R. 692).

ARGUMENT

1. Petitioner contends that the act charged in each of the counts on which she was finally convicted and sentenced, i.e., knowingly causing a false certificate to be made to the Veterans Administration concerning a claim for benefits under the Servicemen's Readjustment Act of 1944, does not constitute a criminal offense under Section 1500 of that Act and Section 15 of the 1933 Act.[1] An identical contention, based on substantially the same arguments that Congress in enacting Section 1500 of the 1944 Act did not validly incorporate the penal provisions of Section 15 of the 1933 Act, that even if the penal provisions were validly in-

[1] Petitioner is mistaken in designating the earlier statute as the World War Veterans' Act of 1924 as amended (see pp. 4-5, *supra*).

corporated into the 1944 Act, they do not apply to the act of causing the making of a false certificate, and that if any penalty attaches to the commission of such an act, it applies only to veterans claiming benefits under the 1944 Act (Pet. 8-12), was urged here at the last term in *Young* v. *United States,* certiorari denied, 339 U. S. 913, reported below, 178 F. 2d 78 (C.A. 9). The Court is respectfully referred to our brief in opposition in that case (No. 565, O. T. 1949) for our answers to these arguments.

2. Petitioner contends (Pet. 17-19) that the condition of probation, as amended by the Court of Appeals, that she make restitution to the veterans involved in the counts on which she was finally convicted is invalid under the probation statute, 18 U.S.C. 3651, *supra,* pp. 5-6, because there was a "total absence" of evidence that the veterans suffered any actual damage or loss as a result of her offenses. The contention is frivolous. It completely ignores the fact that under the Servicemen's Readjustment Act of 1944 a veteran seeking a government guaranteed loan on residential property is entitled to the property at a reasonable value, as appraised by an appraiser designated by the Veterans Administration (Sec. 501(3), *supra,* pp. 3-4). Petitioner purchased the land for resale to veterans under the statute and having herself invoked its benefits in facilitating the sale of the land, she should not now be heard to argue that

the veteran was not entitled to its benefits. Cf. *United States* v. *Berger*, 145 F. 2d 888, 891 (C.A. 2), certiorari denied, 324 U.S. 848. Since the loss suffered by the veteran must be measured in accordance with the provisions of the statute, petitioner's argument that the reasonable value as determined by the appraiser was not necessarily the market value, either at the time of the sale or the time of sentence (Pet. 18), is irrelevant.

3. Petitioner does not contend that the evidence was insufficient to show that she knowingly caused the bank to make the false certificates to the Veterans Administration. She argues, however, that her conviction can not stand (1) because the bank was informed of the actual selling prices of the lots and there was therefore no concealment from it of the fact that those prices exceeded the prices reported to the Veterans Administration, and (2) because there was no proof that she knew the appraised valuations (Pet. 13-16). But concealment from the bank was in nowise an element of her offenses. As the trial court correctly instructed the jury, without objection by petitioner on this score (IV R. 616-617; see also p. 535), the offenses charged against her consisted of knowingly causing the false certificates to be made to the Veterans Administration. The culpability or innocence of the agency through which the falsification was accomplished does not affect her liability. *United*

States v. *Kenofskey,* 243 U.S. 440, 443; *United States* v. *Selph,* 82 F. Supp. 56 (S.D. Cal.).

Similarly, since the evidence is clear that petitioner caused the bank to certify that the prices at which she sold the lots to the veterans were less than the actual prices, it is immaterial that she did not know, as she testified, the reasonable valuations determined by the appraiser.

CONCLUSION

There is no conflict of decisions, and no questions are presented meriting further consideration by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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